RECENT AMERICAN DECISIONS.

Supreme Court of New Hampshire.

JONES ET AL. *v.* SURPRISE.

A person, who in this State, solicits or takes orders for spirituous liquors, to be delivered at a place without this State, knowing, or having reasonable cause to believe, that, if so delivered, the same will be transported to this State and sold in violation of the laws thereof, cannot recover the price of such liquors in the courts of this State, although the sale may be lawful in the State where it takes place.

The rule of comity does not require a people to enforce in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates their public law.

Comity will not extend the remedy afforded by the laws of this State, to enforce a contract valid in the State or country where it is made, when it is tainted by the illegal conduct, within the State, of the party seeking to enforce it.

ASSUMPSIT, to recover a balance due for the sale of wines and spirituous liquors. Plea, the general issue, with a brief statement that the contract was void under Gen. Laws, chap. 109, § 18.

Facts found by the court. At the time of the sale of the liquors in suit, the plaintiffs were liquor-dealers in Boston, and the defendant a saloon-keeper in Suncook. The agent of the plaintiffs solicited orders for the liquors, in the defendant's saloon, and forwarded the orders to the plaintiffs in Boston, having no authority to make a contract for their sale. He informed the defendant that the liquors would be delivered to him at the plaintiffs' storerooms in Boston. When he solicited the orders he had no knowledge of the provisions of Gen. Laws, chap. 109, § 18, and did not intend the violation of any law of this State. He knew at the time of the sale that the defendant bought for the purpose of selling in violation of law. The liquors were delivered to carriers in Boston, for the defendant, and he paid the cost of transportation from Boston to Suncook, where he received them. Their sale was authorized by the law of Massachusetts. The plaintiffs claimed that the sale being valid by the law of Massachusetts, the law of this State prohibiting the taking, or soliciting of orders did not invalidate it. They further claimed that, as the statute prohibits the taking of

orders for spirituous or distilled liquors only, they could recover for the wines. There was evidence tending to show that the wines were intoxicating.

Messrs. Bingham & Mitchell, and *E. F. Jones*, for plaintiffs.
Messrs. Albin & Martin, for defendant.

SMITH, J.—It is made a criminal offense for any person, not an agent, to sell or keep for sale, spirituous liquors, or for any person within this State, to solicit or take an order for spirituous liquor, to be delivered to any place without this State, knowing, or having reasonable cause to believe, that, if so delivered, the same will be transported to this State and sold in violation of our laws. Gen. Laws, chap. 109, §§ 13, 18. One question in this case is whether intoxicating wines are included within the terms of this statute. The legislature has defined intoxicating liquor as follows: "By the words 'spirit,' 'spirituous,' or 'intoxicating liquor' shall be intended all spirituous or intoxicating liquor, and all mixed liquor, any part of which is spirituous or intoxicating, unless otherwise expressly declared." Gen. Laws, chap. 1, §§ 1, 31. As intoxicating wines and other intoxicating fermented liquors are not expressly excluded from the operation of Gen. Laws, chap. 109, §§ 13, 18, 19, the only conclusion is that they come within the prohibition of its terms. No reason appears why the legislature should prohibit the solicitation of orders for one class of intoxicating liquors, and permit it as to others. The construction of statutes is governed by legislative definitions; that of indictments, by the ordinary use of language: *State* v. *Adams*, 51 N. H. 568; *State* v. *Canterbury*, 28 Id. 195.

The remaining question is, whether the plaintiffs can maintain an action in our courts for the price of liquors sold and delivered in a State where the sale is lawful, they having solicited and taken orders for the liquors in this State, in violation of our laws. That their authorized agent, who solicited and took the orders, did not know the solicitation or taking of orders was prohibited, and did not intend the violation of any law, is immaterial. A person is presumed to know and understand, not only the laws of the country where he dwells, but also those

in which he transacts business. In *Hill* v. *Spear*, 50 N. H. 253, it was held by a majority of the court that mere solicitation, by a dealer in liquors, of orders in the future for spirituous liquors, even though he may have had reason to believe, and did believe, that the liquors would be resold by the purchaser in violation of the law of this State, is not such a circumstance as will affect the validity of a subsequent sale of such liquors in a State where the sale is not prohibited. Numerous decisions in England and in this country, upon the subject, were cited and discussed in that case; and an extended review of most of the same authorities may be found in *Tracy* v. *Talmage*, 14 N. Y. 162. Further discussion of the authorities is not called for at the present time. When *Hill* v. *Spear* was decided, the soliciting of orders for spirituous liquors to be delivered without the State, was not prohibited. The present statute (Gen. Laws, chap. 109, §§ 18, 19), first enacted in 1876 (Laws 1876, chap. 33), makes the mere soliciting or taking of such orders, or the going from place to place soliciting or taking such orders, with knowledge or reasonable cause to believe that the liquors will be transported to this State and sold in violation of law, without any other act in furtherance of the vendee's design, a criminal offense punishable by fine or imprisonment. The plaintiffs' authorized agent, who solicited and took these orders from the defendant, knew the liquors were to be kept and sold by the defendant in this State, in violation of law. His knowledge is, in law, the knowledge of the plaintiffs.

The plaintiffs contend that, inasmuch as the soliciting of orders constituted no part of the contract when the soliciting was not prohibited, the act of soliciting, now that it is made illegal, cannot vitiate a contract of which it forms no part. The case is not affected by the plaintiffs' ability to prove a sale without proof of the solicitation. No people are bound to enforce or hold valid in their courts of justice any contract which is injurious to their public rights, or offends their morals, or contravenes their policy, or violates public law. And every independent community will judge for itself how far the rule of comity between States is to be permitted to interfere with its domestic interests and policy: 2 Kent. Com. 457, 458; *Hill* v. *Spear*, 50 N. H. 253, 262; *Bliss* v. *Brainard*, 41 Id. 256, 258. The ob-

ject of the statute of 1876 (Gen. Laws, chap. 109, §§ 18, 19), was to discourage the sale of liquor in other States, to be transported to this State and sold in violation of its statutes. New Hampshire cannot prohibit the sale of liquor in other States, but it can punish, as it does by this statute, acts done in this State with the purpose of facilitating sales of intoxicating liquors in other States, to be transported to this State, and to be illegally sold here, in contravention of our policy and to the injury of our citizens. The statute was intended to make such sales and transportation difficult, if not impossible, by subjecting those who violate its provisions to the penalty of fine or imprisonment. Where a statute provides a penalty for an act, this is a prohibition of the act. In *Bartlett* v. *Vinor*, Carth. 252; S. C. Skin. 322, HOLT, Ch. J., said: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." Accordingly, it is everywhere held that wherever an indictment can be sustained for the illegal sale of liquors or other goods, there the price cannot be recovered: *Bliss* v. *Brainard*, 41 N. H. 256, 268; *Smith* v. *Godfrey*, 28 Id. 384; *Caldwell* v. *Wentworth*, 14 Id. 431; *Lewis* v. *Welch*, Id. 294; *Pray* v. *Burbank*, 10 Id. 377; and if this was a New Hampshire contract, the plaintiffs could not recover. The law does not help the seller to recover the price of goods, the sale of which it interdicts. The reason of this rule applies in this case. Although this is a Massachusetts contract, it had its inception in this State, in direct violation of our laws. Orders for these liquors were solicited and taken here by the plaintiffs' agent, sent here for that purpose, were transmitted by him to the plaintiffs, were accepted by them, and became the basis of the contract which they seek to enforce in this State. The orders are evidence for the plaintiffs as to price, quantity, and kinds of liquors purchased, as well as of an offer by the defendant to purchase, if, indeed, it is not true that the plaintiffs cannot prove their case without founding it upon the orders. Both the soliciting and taking of the orders was an indictable offense in which the agent was principal.

The inciting, encouraging, and aiding another to commit a misdemeanor is itself a misdemeanor: Russ. Cr. 46, 47. The plaintiffs stand precisely as they would, if they, instead of their agent, had solicited and taken the orders: Gen. Laws, chap. 284, § 7. Having aided, abetted, procured, and hired their agent to violate our laws, by soliciting and taking orders for the very liquors embraced in this contract, they cannot with any grace invoke the remedy afforded by our laws to recover the price. No rule or comity requires us to enforce, in favor of a non-resident, a contract which had its origin in the open violation of law, and which would not be enforced in favor of our own citizens, especially when it is offensive to our morals, opposed to our policy, and injurious to our citizens. Its enforcement would tend to nullify the statute which the plaintiffs have caused to be violated. The law which prohibits an end, will not lend its aid in promoting the means designed to carry it into effect. It does not promote in one form, that which it prohibits in another: *White* v. *Russ*, 3 Cush. 448, 450. The opinion in *Hill* v. *Spear* (50 N. H. 264), concedes that there could be no recovery if the plaintiffs had actively participated in an illegal act in effecting the sale, and is put upon the ground that Stewart, their agent, did not advise, request, or encourage any violation of the laws of this State.

In *Bliss* v. *Brainard*, 41 N. H. 256, 268, we said: "Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. So, if the contract be in part only connected with the illegal consideration, but growing immediately out of it, though it be, in fact, a new and separate contract, it is equally tainted by it." In that case the plaintiff sought to recover for the value of the casks in which the liquors were contained, and for the freight and cartage of the liquors, the sale of the liquors being unlawful. FOWLER, J., said: "Aside, therefore, from the positive provisions of the Massachusetts statute, withdrawing all protection from vessels and casks when employed as the instruments for perpetrating a violation of positive law, we think the sale of the casks was so tainted with the illegality of the sale of the liquors, so much a part of the *res gestæ* of the main illegal and criminal transaction, and so much the mere

instrument whereby it was accomplished, that no action can be maintained to recover their price." For analogous reasons the plaintiffs in this case cannot recover. Although this is a Massachusetts contract, valid in that State, it is so tainted by the plaintiffs' illegal conduct in soliciting, taking, and transmitting orders in violation of the statute, that comity will not extend to them the remedy afforded by our laws. The taking of such orders tends directly to encourage the illegal sale of liquors in this State, and being prohibited, it follows that an action to recover the price of liquors sold and delivered pursuant to orders so solicited, cannot be maintained in this State, although the sale of intoxicating liquors in the State or country where they are sold and delivered, is not illegal: *Dunbar* v. *Locke*, 62 N. H.

Judgment for the defendant.

CARPENTER, J., did not sit; the others concurred.

It is well settled, that the validity of a contract is to be decided by the law of the place where it was made, unless it was agreed, either expressly or impliedly, that it should be performed elsewhere; in which case, the general rule, according to the better opinion, is that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance: Story Confl. Laws, § 298 *et seq.*; *Hill* v. *Spear*, 50 N. H. 253. See, however, 2 Pars. on Cont. *582, and cases cited.

It may also be regarded as settled that contracts, valid by the law of the place where made, are generally valid everywhere, *jure gentium*. And if, in the place where the contract is made, the policy of the local law would enforce it, it will also be enforced in the jurisdiction to which a party may be compelled to resort for the application of a remedy for the violation of such contract. An exception to this rule, however, consists in this, that no nation or State is bound to recognize or enforce any contracts which are injurious to its own interests or the welfare of its own people, or which are in fraud and violation of its own laws: *Hill* v. *Spear*, *supra*, where the question will be found well considered. In that case, E. kept a saloon in M. in New Hampshire, where he was accustomed to retail spirituous liquors contrary to law. S. was a dealer in such liquors in the State of New York, where such traffic was not prohibited. S. had visited E.'s saloon in M. and on one occasion had solicited orders from E. for liquors. Subsequently, S. sold to E. a quantity of spirituous liquors, the contract of sale of which was made and completed and the goods delivered in New York. S. had no interest nor concern in the disposition of the liquors by E., and did no act beyond the sale to E. in furtherance of E.'s purpose to sell the same in New Hampshire; but there was evidence tending to show that S. when he solicited orders from E. prior

to the sale of the liquors, had reasonable cause to believe and did believe that E. intended to resell the same at his saloon in New Hampshire. Upon this state of facts, it was *Held*, that the contract of sale being valid by the laws of New York, should be enforced in New Hampshire. BELLOWS, C. J., dissented from this decision, upon the ground that the coming into the State and soliciting orders for liquors and encouraging the party to buy and sell contrary to law, was such a direct participation of the vendor in the violation of law as to preclude a recovery. It did not appear, however, that there was any express solicitation of this order, which was made by letter (not, however, according to the view of FOSTER, J., who delivered the opinion of the majority of the court, in pursuance of any previous contract or understanding); and the liquors so ordered were delivered by the vendor to a carrier in New York, conveyed to E. in New Hampshire, where they were received by him. There was no evidence that the vendor advised, requested, or encouraged the sale of liquors by E. contrary to law, in any other way than by soliciting him to purchase them as above stated; nor that he had any participation in the resale otherwise than by furnishing them to E. for a price which does not appear to have been regulated by any consideration relative to their final disposition. It did not appear that the vendor at the time of the sale, had any actual knowledge of E.'s purpose or intentions with regard to their disposition; and the majority of the court treated the contract simply as one of sale and delivery, in New York, where the sale was legal.

The question involved in *Hill* v. *Spear* was ably and exhaustively discussed, and in our judgment the conclusion arrived at, was in accordance with reason and authority. *Hill* v. *Spear* was decided in December, 1870. In 1876, the legislature of that State passed an act, which will be found in §§ 18, 19, Ch. 109, of the Gen. Laws of New Hampshire, which read as follows:

"§ 18. If any person shall within this State solicit or take any order for any spirituous liquor to be delivered at any wharf, depot, or other place without this State, knowing or having reasonable cause to believe, that if so delivered the same will be transported to this State and sold in violation of the laws thereof, he shall be fined $50 for the first offense of which he shall be convicted," etc.

"§ 19. If any person shall go from place to place soliciting or taking orders for spirituous liquors to be delivered as aforesaid, and with the purpose aforesaid, he shall be fined," etc.

Under this statute arose the principal case. The soundness of the rule laid down in *Hill* v. *Spear*, that the validity of a vendor's claim to recover the price of goods sold with knowledge that the purchaser intends to make an unlawful use of them, depends upon the circumstance whether or not the original vendor participated actively, to a greater or less extent in the subsequent unlawful disposition of the goods; or whether the expectation of advantage and profit to him growing out of the unlawful disposition of the goods by the purchaser, entered into and constituted a part of the inducement and consideration of the original sale; that if such expectation of advantage to the vendor, was an ingredient in the consideration for the original sale, or if the original vendor participated in the subsequent unlawful disposition of the goods, he cannot recover the price

thereof in the courts of the State to which they are taken for sale contrary to law; but that mere belief on the part of the vendor, that the purchaser buys for the purpose of carrying them into such other State to be there resold in violation of law, does not invalidate the sale, is not in the least shaken or impaired by the decision in the principal case. There can be no doubt that the contract in the principal case was a Massachusetts contract and hence valid in that State. But the principal case differs from *Hill* v. *Spear*, in the very important fact that the plaintiffs' authorized agent who solicited and took the orders from the defendant, was sent to New Hampshire to take such orders and knew the liquors were to be kept and sold by the defendant in New Hampshire, in violation of law; that the orders were transmitted by such agent to plaintiff, were accepted by him and became the basis of the contract in question; and also that both the soliciting and taking of such orders was an indictable offense. [*Brown* v. *Browning*, S. Ct. R. I., December 9, 1886, on a conflict of Sunday laws, and *Brown* v. *Finance Co.*, U. S. C. Ct. S. Dist. N. Y., May 11, 1887, on a conflict of usury laws, point out the distinction to be observed between immoral contracts and those simply forbidden.—*J. B. U.*]

In addition to *Hill* v. *Spear*, and the cases cited in the opinion in the principal case, the reader's attention is especially called to the leading case of *Holman* v. *Johnson*, Cowp. 341, decided by Lord MANSFIELD in 1775; *Gaylord* v. *Soragen*, 32 Vt. 110; *Aiken* v. *Blaisdell*, 41 Id. 656; *Territt* v. *Bartlett*, 21 Id. 184; *Adams* v. *Coulliard*, 102 Mass. 167; *Finch* v. *Mansfield*, 97 Id. 89; Story on Cont., § 625.

M. D. EWELL.

Chicago.

Supreme Court of Indiana.

THE MUNCIE NATIONAL BANK *v.* BROWN.

A notary public had, for several years, been using a seal of his own, but, in attesting the certificate of acknowledgment to the chattel mortgage involved in this action, used a seal belonging to another person. The designs of the seal were somewhat different, one of them bearing the words, "Notary Public, Seal, Indiana," the other bearing the words, "Notary Public, Delaware Co., Ind." *Held*, that the certificate was not invalidated, and that the mortgage was entitled to be admitted to record.

The mistake or wrong of a public officer, in placing a seal upon a certificate of acknowledgment, is not available under an answer of general denial, where the instrument is fair and perfect on its face.

A mortgagee has a right to a personal judgment and to a decree establishing his lien, although the mortgaged property is in the hands of a receiver.

A description of personal property, stating in general terms its character, and specifically stating in what building and rooms it is situated, is sufficient.

Under the statutes of Indiana, fraud is a question of fact, and a chattel mortgage cannot, as matter of law, be adjudged fraudulent because it contains